The Evmar

HIGH COURT (SINGAPORE) – ADMIRALTY IN REM NO 59 OF 1988
CHAO HICK TIN JC
20 APRIL 1989

Shipping – Arrest of vessel – Arrest in rem – Damage to cargo – Whether affidavit leading arrest made full disclosure – Whether fact of arbitration clause in bill of lading had to be disclosed – Whether negotiations between parties had to be disclosed – Whether affidavit had to depose to fact that defendants lacked the means to satisfy any arbitration award against them – Rena K principle – Whether ship arrested should be kept under arrest or defendants' letter of undertaking retained by plaintiffs – Whether damages payable by plaintiffs for wrongful arrest – Whether damages payable for wrongful continuance of arrest – High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed) – Arbitration (Foreign Awards) Act (Cap 10A, 1985 Ed), s 4(3) – Rules of the Supreme Court 1970, O 70 r 4 – UK Arbitration Act 1950, ss 1(1)& 4(1) – UK Civil Jurisdiction and Judgments Act 1982, s 26 – UK Arbitration Act 1975, s 1

The plaintiffs were the owners of a cargo of corn ('the cargo') which were shipped on board the Evmar ('the ship') which was owned by the defendants. The cargo was allegedly damaged while in the course of carriage aboard the ship. A writ in rem claiming for damages was issued and the ship was arrested pursuant to a High Court warrant issued on the same day. Prior to the arrest, the plaintiffs had asked agents of the defendants to furnish a guarantee from a P&I Club. The defendants agreed to furnish security for the plaintiffs' claim subject to certain reservations. These reservations were not accepted by the plaintiffs who proceeded to arrest the ship. On 14 March 1988, the defendants informed the plaintiffs that in order to mitigate their own losses, they would agree to the plaintiffs' demands for security, and a letter of undertaking was accordingly faxed to the defendants' solicitors. The plaintiffs however refused to release the ship but asked the defendants to file a bail bond to obtain the release of the ship. Subsequently, on the same day, the defendants applied by summons-in-chambers for an order, inter alia, setting aside the warrant of arrest. The application, which was heard by the deputy registrar on 15 March 1988, set aside the warrant of arrest, released the ship from arrest, stayed all proceedings on the ground that the bill of lading had an arbitration clause, ordered the plaintiffs to pay the defendants damages for the wrongful arrest and detention of the ship, and ordered costs to be taxed and paid by the plaintiffs to the defendants. The plaintiffs appealed to the High Court against all these points except the staying of proceedings.

The defendants claimed that the warrant should be set aside as the affidavit sworn to lead it did not disclose material facts, namely the presence of an arbitration clause on the bill of lading for the cargo, and that the parties were negotiating for a letter of undertaking in lieu of arrest. It was also claimed that the affidavit should have deposed to the fact that the defendants lacked the means to satisfy any arbitration award, but failed to do so. The plaintiffs claimed that notwithstanding the deputy registrar ordering an unconditional stay of the proceedings, the High Court should impose a term that the stay is conditional upon the arrest being maintained or the letter of undertaking being retained as alternative security to satisfy any arbitration award that might be given against the defendant.

Held, allowing the appeal in part:

(1) The mere fact that there is an arbitration clause in a bill of lading does not preclude a plaintiff from instituting an action in rem against a ship. The only prerequisite to the court's jurisdiction to issue a warrant of arrest is that the writ must have been filed in an action in rem.

(2) On the basis of case authority, there was no material non-disclosure in the present case by the mere fact that the affidavit to lead the warrant of arrest did not disclose that there was an arbitration clause on the bill of lading.

(3) While it was open to the defendants to apply for a stay of proceedings, that had not yet occurred at the time the plaintiffs' affidavit was sworn. The question whether the defendants were able or unable to satisfy an arbitration award did not arise at this stage and there was therefore no material non-disclosure by the plaintiffs.

(4) The matters that must be stated in an affidavit leading the warrant of arrest are prescribed in O 70 r 4 of the Rules of the Supreme Court. Nothing there requires that matters relating to pending negotations for security should be stated in the affidavit. The fact of negotiation between the parties was therefore immaterial.

(5) The plain reading of s 4(3) of the Arbitration (Foreign Awards) Act shows that the power of the court to impose conditions must be imposed at the time the order was made staying the proceedings. The deputy registrar gave an outright order to stay without imposing any conditions. And since the plaintiffs have withdrawn their appeal against the order, it was not open to the High Court, as an appellate court, to vary the order granting an unconditional stay when the order is no longer under appeal.

(6) The question here is whether the court, following the principle laid down in *The Rena K*,[5] should order that the ship be kept under arrest or the letter of undertaking be retained to meet whatever award that might be made against the defendants.

(7) This principle, however, could only apply if there was evidence to show that if the plaintiffs should obtain an award in respect of the full amount of their claim, the defendants might well be unable to satisfy it. No evidence of this was produced. On the contrary, there is evidence that the P&I Clubs were prepared to stand by and indemnify the defendants against the claim made by the plaintiffs. Accordingly, the ship should be released from arrest and the letter of undertaking given to the plaintiffs as an alternative security should be returned.

(8) While the ship should be released, the warrant of arrest should not be set aside since there was nothing wrong in the issue of it or its execution.

(9) Whether there are any damages due eventually to the defendants on account of the arrest would have to await the outcome of the substantive claim that is being referred to arbitration. It is within the power of an arbitrator to award damages for wrongful arrest. To succeed in such a claim, the defendants would have to show there was mala fides or malicious negligence on the part of the plaintiffs.

(10) The only issue then was whether the fact that the defendants agreed to furnish the letter of undertaking 'under protest' gave the plaintiffs a reasonable cause not to release the ship. The expression 'under protest' means no more than that the defendants were reserving their rights, which they were entitled to do.

(11) Since alternative security had been furnished to the plaintiffs in terms which they had asked for, the plaintiffs had no further reasons not to release the ship. The test to be applied to determine whether there was wrongful continuance of an

arrest is the same as that applicable to wrongful arrest, ie mala fides or crassa negligentia implying malice.

(12) The plaintiffs' refusal on 14 March 1988 to accept the letter of undertaking amounted to at least malicious negligence. The plaintiffs are therefore liable for damages for the continued detention of the ship from 14 to 15 March 1988.

(13) The assessment of the quantum of damages for the wrongful continuance of arrest should be left to the arbitrator to whom the claim is being referred.

(14) The appeal as regards the second order to set aside the warrant of arrest is allowed. Order 3 (releasing the ship from arrest) will remain. So will orders 1 and 4 (allowing the time for service of defendants' application to set aside the arrest to be abridged and staying the plaintiffs' proceedings) (in respect of which the plaintiffs withdrew their appeal). Order 5 (ordering the plaintiffs to pay the defendants damages which were to be assessed by the registrar) would be modified to leave the arbitrator to assess damages for the wrongful arrest of the ship from 14 to 15 March 1988.

(15) There were two main applications in the summons taken out by the defendants – to have the warrant of arrest set aside and to obtain a stay of proceedings. The defendants have failed on the first application but succeeded in the second. The arguments before the deputy registrar centred more on the first point than the second. Before the High Court, there was hardly any argument regarding the second point. Having regard to all the circumstances, the plaintiffs should bear only one-third of the costs of the defendants for the hearings before the deputy registrar and before the High Court.

[*Editorial Note:* The plaintiffs have appealed to the Court of Appeal vide Civil Appeal No 42 of 89.]

Cases referred to

1 *The Vasso* [1984] 1 Lloyd's Rep 235 (follid)
2 *R v Kensington Income Tax Commissioners* [1917] 1 KB 486 (refd)
3 *The Tuyuti* [1984] 2 Lloyd's Rep 51 (follid)
4 *The Golden Trader* [1974] 1 Lloyd's Rep 378 (refd)
5 *The Rena K* [1978] 1 Lloyd's Rep 545 (distd)
6 *The Jalamatsya* [1987] 2 Lloyd's Rep 164 (refd)
7 *Astro Vencedor SA* v *Mabanaft* [1971] 2 QB 588
8 *The Evangelismos* (1858) 12 Moo PC 352, 14 ER 945 (refd)
9 *The Strathnaver* (1875) 1 App Cas 58 (refd)
10 *The Margaret Jane* (1869) 2 Adm & Ecc 345 (follid)

Legislation referred to

Arbitration (Foreign Awards) Act (Cap 10A, 1985 Ed) s 4(3)
High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed)
Rules of the Supreme Court 1970 O 70 r 4
Arbitration Act 1950 [UK] ss 1(1), 4(1)
Arbitration Act 1975 [UK] s 1
Civil Jurisdiction and Judgments Act 1982 [UK] s 26

Augustin Liew for the appellants/plaintiffs.
Steven Chong for the respondents/defendants.

Cur Adv Vult

Chao Hick Tin JC: The plaintiffs were the owners of 7,398 metric tons of US No 2 or Better Yellow Corn ('the said cargoes') which were shipped on board the vessel 'Evmar' from Tacoma, Washington, USA to Singapore under a bill of lading numbered TAC/SING-1 and dated 13 February 1988. The plaintiffs alleged that the said cargoes were damaged in the course of carriage. The present writ in rem claiming for damages was issued on 12 March 1988 and the vessel 'Evmar' was arrested pursuant to warrant issued by the High Court on the same day. At the time the warrant was issued, the said cargoes were still being unloaded at the wharf in Singapore.

Prior to the arrest, Godwin & Co, the solicitors for the plaintiffs, faxed (on 11 March 1988 at 5.55pm) a letter dated 11 March 1988 to the local representatives of the shipowners claiming damages and asking for, inter alia, the furnishing within seven days, of a guarantee from the P&I Club in the sum of $175,000. In the meantime the P&I Club was to submit a letter of undertaking. The following morning on 12 March 1988 (a Saturday), at about 9.30 am, the solicitors for the defendants, Drew & Napier, faxed a reply to Godwin & Co agreeing to the furnishing of security at $175,000 subject to, inter alia, the following reservations:

(i) right of the defendants to apply to court to set aside or stay the present proceedings in view of an arbitration clause in the bill of lading; and
(ii) the consideration for the guarantee should extend to sister ships of 'Evmar' and other vessels owned by charterers and persons in possession and control of 'Evmar'.

At about 10.57am that morning, (I gather the time from the figures '88 03/13 10.57' printed on the top portion of the first page of exh SC3 to Steven Chong's affidavit of 14 March 1988; it seems to me that the figure '13' must be an error as the receipt stamp of Drew & Napier shows it was received on 12 March 1988) Godwin & Co faxed a message demanding that the security be raised to $320,000 and that Drew & Napier should give the undertaking by 11.30am. I would observe that while the time given to respond was short, I can understand why the deadline of 11.30am was prescribed as that was a Saturday and the High Court Registry only worked half a day. The warrant had to be obtained before the Registry closed. The vessel was scheduled to leave that night as soon as it completed the discharge of its cargoes. The solicitor in charge in Drew & Napier had notice of this message only at 11.15am. Nevertheless, he managed to contact clients in London and faxed a reply at about 11.45am agreeing to the increased amount. However, Drew & Napier, in line with their reservation mentioned in (ii) above, suggested that para 3 of the letter of undertaking be amended.

The text of para 3 proposed by M/s Godwin & Co reads as follows:

> ... in consideration of your at our request refraining from arresting or detaining the ship or vessel 'Evmar' now in Singapore or any other ship in the same ownership or chartered to or in the possession or control of the same owners as the vessel 'Evmar' within the meaning of the High Court (Admiralty Jurisdiction) Act ...

The text suggested by Drew & Napier on the other hand reads:

> ... in consideration of your at our request refraining from arresting or detaining the ship or vessel 'Evmar' now in Singapore or any other ship in the same ownership or any other ship belonging to the charterers or to any person who has or had at any time the possession or control of the said MV 'Evmar' within the meaning of the High Court (Admiralty Jurisdiction) Act ...

It would appear that sometime after 11.30am Godwin & Co obtained the warrant of arrest. At 12.22pm that same day, Godwin & Co replied to Drew & Napier to say that they did not agree with the wording suggested by Drew & Napier and informed the latter that the plaintiffs would proceed to arrest the vessel and the defendants could 'go ahead to file a bail bond for the release of the (vessel)'. At about 12.40pm, Mr Chong, the solicitor in Drew & Napier in charge of this matter, went on board 'Evmar' to investigate the alleged claim. At about 1.30pm, Mr Liew, a solicitor with Godwin & Co came with a plaintiff to arrest the ship. Mr Chong attempted unsuccessfully to dissuade Mr Liew from proceeding with the arrest and even stated in writing that 'if the amendments to para 3 cannot be amicable resolved, I will undertake to amend the undertaking in accordance with your para 3, if the court so orders.'

On 14 March 1988, the defendants through their solicitors faxed a message to say that in order to mitigate their losses they would agree to the wording of para 3 of Godwin & Co under protest and that the letter of undertaking would be given without prejudice to their rights. They also faxed to Godwin & Co the letter of undertaking in the terms demanded by Godwin & Co. Accordingly, Drew & Napier requested Godwin & Co to release the vessel. Godwin & Co replied at 11.42am and asked Drew & Napier to file a bail bond to obtain the release of the vessel. Subsequently, on that same day, the defendants applied by summons-in-chambers for an order that the warrant of arrest of 12 March 1988 be set aside, that the vessel be forthwith released from arrest, that the undertaking furnished be discharged and returned to the defendants, that there be a stay of all further proceedings herein and lastly that the plaintiffs do pay damages to the defendants for the wrongful arrest and detention and the damages to be assessed by the registrar. The application, which came up for hearing on 15 March 1988, was granted by the deputy registrar, who made the following orders:

1 Time for service of this application be abridged.
2 That the warrant of arrest issued on the 12th day of March 1988 for the arrest of the mv 'Evmar' be set aside.
3 That the mv 'Evmar' now under arrest in these proceedings by the plaintiffs be forthwith released from the arrest and that the letter of undertaking furnished to the plaintiffs in order to procure the release of the mv 'Evmar' be discharged and returned to the defendants forthwith.
4 That there be a stay of all further proceedings on the ground that the dispute to which it relates to is one which the parties herein have agreed to refer to arbitration in London.
5 That the plaintiffs do pay to the defendants damages for the wrongful arrest and detention of the defendants' vessel 'Evmar', such damages to be assessed by the registrar; and
6 That the costs and incidental to this application be taxed and paid forthwith by the plaintiffs to the defendants.

It is against the orders of the deputy registrar that the plaintiffs have now appealed. During the hearing of this appeal, the plaintiffs withdrew their appeal against the first order (for abridging time) and the fourth order (for the stay of the present proceedings).

Should the warrant of arrest be set aside?

The defendants attacked the issue of the warrant of arrest on three grounds:

(i) The affidavit sworn to lead the warrant of arrest did not disclose that there was an arbitration clause in the bill of lading;
(ii) The affidavit did not depose to any fact that the defendants lacked the means to satisfy any arbitration award; and
(iii) The affidavit did not disclose that the parties were negotiating for a letter of undertaking in lieu of arrest.

I would at the outset state that the mere fact that there is an arbitration clause in a bill of lading does not preclude a plaintiff from instituting an action in rem against the vessel. The only prerequisite to the court's jurisdiction to issue a warrant of arrest is that a writ must have been filed in an action in rem. This principle was laid down in *The Vasso*[1] (previously known as '*The Andria*') where at pp 241-2 Goff LJ (as he then was) stated the following:

> The mere fact that the dispute between the parties falls within the scope of an arbitration agreement entered into between them does not of itself generally preclude one of them from bringing an action. Accordingly, the mere existence of an arbitration agreement will not of itself prevent a party from issuing a writ, or serving the writ and (in the case of an action in rem) procuring the arrest of the ship, or otherwise proceeding with the action. But the arbitration agreement can, of course, have certain consequences. For example, if an action is begun, the other party may apply for a stay of proceedings.

In the present case, it is true that in the affidavit sworn to lead the warrant of arrest, nothing was mentioned about the arbitration clause. It is, of course, an established rule that in an ex parte application, there should be full and frank disclosure to the court of all material facts known to the applicant and that failure to make such disclosure may result in the discharge of any order made upon the ex parte application, even though the facts were such that, with full disclosure, an order would have been justified: *R* v *Kensington Income Tax Commissioners, ex p*

Polignac.[2] The question is therefore whether the non-mention of the arbitration clause amounts to a material non-disclosure.

In *The Vasso*,[1] while the affidavit sworn to lead the warrant of arrest was in the usual form, it did not state the fact that, after the dispute had arisen, the parties had entered into an ad hoc arbitration agreement and that the parties were, at the time when the affidavit was sworn, actively pursuing proceedings under that arbitration agreement. The English Court of Appeal held that this amounted to a failure to disclose material facts. Counsel for the defendants herein sought to rely on *The Vasso*[1] to contend that there was material non-disclosure on the part of the plaintiffs. In my view, the facts in the present case are not similar to those in *The Vasso*,[1] where the arbitration proceedings were being actively pursued. Instead, I think this case is more akin to *The Tuyuti*[3] where this very point was addressed by Goff LJ at p 63 as follows:

> ... I should briefly mention one other argument advanced by Mr Teare. This was that, since the affidavit sworn to lead the warrant of arrest did not disclose the fact that there was an arbitration clause in the wool bill of lading, there had not been the full and frank disclosure which is required on ex parte applications of this kind, and on that ground also the arrest should be set aside: see *The Vasso*. In my judgment, this argument is without substance, as appears from the judgment in that case. There an arrest was set aside because the affidavit to lead the warrant failed to disclose that at the date of the affidavit the parties had entered into an ad hoc arbitration agreement for the resolution of the very dispute which was the subject matter of the action in rem and that the parties were actively pursuing arbitration proceedings under that agreement. In such circumstances the court would, had it been aware of those facts, have declined to exercise its jurisdiction to issue a warrant, unless facts were also deposed to (which they were not) bringing the case within the principle in *The Rena K*. The present case is, however, not such a case. It does not follow that because there is an arbitration agreement, eg as here, an arbitration clause in a bill of lading, that agreement will be invoked for the purpose of deciding a dispute which has arisen under it, and so, as is pointed out in the judgment in *The Vasso* (at pp 241-242), the mere fact that there is an arbitration agreement does not of itself generally preclude a party of the agreement from bringing an action or, in the case of an action in rem, procuring the arrest of a ship. I can discern no lack of disclosure in the affidavit to lead the warrant in the present case.

On the basis of that authority, there was, in my opinion, no material non-disclosure in the present case by the mere fact that the affidavit to lead the warrant did not disclose that there was an arbitration clause in the bill of lading.

Turning to the second ground that the affidavit sworn to lead the warrant of arrest did not depose whether the defendants were or were not able to satisfy an arbitration award, I do not think this question arose at all at that stage. As stated above, notwithstanding the fact that in the bill of lading, there is an arbitration clause, that does not preclude the plaintiffs from instituting this action in rem and to apply for a warrant of arrest. While it is open to the defendants to apply for a stay pursuant to s 4 of our Arbitration (Foreign Awards) Act (this reservation was expressly made by Drew & Napier in their faxed message of 12 March 1988), that had not yet occurred at the time the affidavit was sworn. The defendants could, notwithstanding their reservation, very well have allowed this action to proceed. So the question whether the defendants were able or unable to satisfy an arbitration award did not arise at that stage. I do not see any need for the plaintiffs to refer to that question. Accordingly, I see no merit in this ground. There was no material non-disclosure here.

In this regard it may be of relevance to refer to *The Tuyuti*[3] where the cargo-owners of certain wool and screws shipped on board that vessel claimed damages for damage to the wool and for the loss of the screws. There the bill of lading for the carriage of the wool contained a London arbitration clause. However, the bill of lading for the carriage of the screws contained an exclusive jurisdiction clause which required that the dispute must be referred to a court of Uruguay and the proper law of that bill was the law of Uruguay. The cargo-owners issued a writ in England and obtained a warrant of arrest. Shortly thereafter the parties agreed to refer the disputes under both bills of lading to arbitration. Counsel for the plaintiffs herein tendered to me a true copy of the affidavit sworn to lead the arrest in *The Tuyuti*.[3] Nothing was alluded in that affidavit regarding the question of means. The English Court of Appeal did not declare that the warrant issued was wrong on account of such non-disclosure. Instead, it lifted an order made by the High Court to stay the execution of the warrant.

As regards the third ground, it is true that at the time the application for the warrant of arrest was made, the solicitors of the parties were negotiating for alternative security in lieu of an arrest. As described above the hitch related to the wording of the letter of undertaking. As the parties were unable to agree, the plaintiffs proceeded with the application for the warrant and the vessel was duly arrested. The question is: must the fact of pending negotiations be disclosed in the affidavit sworn to lead the warrant of arrest? It is quite clear that when the plaintiffs' counsel appeared before the assistant registrar to apply for the warrant of arrest, no concluded agreement had yet been reached regarding alternative security, whatever might be the cause. The matters that must be stated in such an affidavit are prescribed in O 70 r 4 of the RSC. Nothing in that rule requires that matters relating to pending negotiations for security should be stated in the affidavit. Obviously, if the negotiations had succeeded, there would have been no need to apply for a warrant. It was precisely because the parties were unable

to reach an agreement for alternative security that the arrest was proceeded with. I do not think it matters what was the point of difference between the parties that held up an agreement or whether who was right or who was wrong. The plaintiffs were entitled to security and unless an agreement was reached as to alternative security, the plaintiffs were at liberty to proceed. The fact of negotiation is, in my view, quite immaterial.

No authority has been cited in support of the proposition that the fact of pending negotiations must be disclosed in the affidavit and that such a failure would amount to a material non-disclosure. As no merits have been shown on any of the three grounds, there is, therefore, no basis to set aside the warrant of arrest.

Should the vessel be released and the letter of undertaking discharged?

Though the warrant of arrest had been validly issued and executed, the next question to consider is whether, in view of the circumstances then before the deputy registrar, and now before me, the vessel should be released and the letter of undertaking discharged. On this question the arguments would appear to centre round s 4(3) of the Arbitration (Foreign Awards) Act. Under that provision, the court to which an application is made to stay any proceedings commenced in the courts in Singapore on the ground that the matter should be referred to arbitration, may, in making an order for stay, impose 'such conditions or terms as it thinks fit'. The plaintiffs argued that pursuant to this discretionary.power, I should, notwithstanding that the deputy registrar ordered an unconditional stay of this action, impose a term that the stay is conditional upon the arrest being maintained or the letter of undertaking being retained as alternative security to satisfy any possible arbitration award that might be given against the defendants.

A plain reading of s 4(3) shows that the power of the court to impose conditions or terms must be imposed at the time the order was made staying the proceedings. The deputy registrar gave an outright order to stay without imposing any condition. The plaintiffs have, before me, withdrawn their appeal against that order. That being the case, it is not open to me, as the appellate judge, to vary that order granting an unconditional stay when that order is no longer under appeal. In England there is a distinction between arbitration agreements which are domestic and those which are not. In the former, the court in granting a stay could impose conditions, including the retention of security: s 4(1) of the English Arbitration Act 1950. In the latter, where the matters come within s 1(1) of the English Arbitration Act 1975, a stay must be granted by the court and the stay cannot be made conditional on the provision of security, subject to the *Rena K*[5] principle discussed below.

Counsel for the plaintiffs conceded that in respect of a non-domestic arbitration agreement, as a general rule, a party cannot arrest a ship for the sole purpose of obtaining security for arbitration proceedings. This was declared by Brandon J (as he then.was) in *The Golden Trader*[4] at p 385 as follows:

> ... Putting it shortly, if there is a stay there must, as a necessary consequence, be a release. In cases where the grant of a stay is discretionary, the court can refuse a stay unless alternative security is provided.

This position of the law was reaffirmed and explained by Robert Goff LJ in *The Vasso*[1] at p 242:

> However, on the law as it stands at present, the court's jurisdiction to arrest a ship in an action in rem should not be exercised for the purpose of providing security for an award which may be made in arbitration proceedings. That is simply because the purpose of the exercise of the jurisdiction is to provide security in respect of the action in rem, and not to provide security in some other proceedings, for example, arbitration.

Goff LJ then went on to say that the time might well come when the law on this point might be changed. He had in mind s 26 of the Civil Jurisdiction and Judgments Act 1982, which was then not yet brought into force. It was subsequently brought into force on 1 November 1984. The present position in England is that a claimant in arbitration may issue a writ in rem and arrest a ship of the respondent in order to obtain security for any award which the claimant might obtain against the respondent in that arbitration: see *The Jalamatsya*.[6]

Therefore, the position in England prior to s 26 was that no security could be given for an arbitration award unless the situation falls within the principle set out in *The Rena K*.[5] That was a case where the court had no discretion to ask for alternative security as a condition for a stay as the case came within s 1 of the English Arbitration Act 1975 and a stay must be granted. Nevertheless, Brandon J held that, where it was shown by the plaintiff that an arbitration award in his favour was unlikely to be satisfied by the defendant, the security available in the action in rem might be ordered to stand or alternative security could be ordered in substitution thereof so that, if the plaintiff might have thereafter to pursue the action in rem, because the arbitration award was not satisfied, the security would remain available in that action. The *Rena K* principle was approved by the Court of Appeal in *The Tuyuti*.[3] However, for the *Rena K* principle to apply there must be evidence before the court that the defendant would be unlikely to satisfy an arbitration award.

The question now is, should this court, following the principle established in the *Rena K*,[5] nevertheless order that the Evmar be kept under arrest or the letter of undertaking be retained to meet whatever award that might be made against the defendants. But for the *Rena*

K principle to apply there must be evidence to show that if the plaintiffs should obtain an award in respect of the full amount of that claim, the defendants might well be unable to satisfy it. No evidence is placed before me on that at all. On the contrary, there is evidence that the P & I Clubs are prepared to stand by and indemnify the defendants against the claim made by the plaintiffs. In the circumstances, there is no basis for applying the *Rena K* principle. Accordingly, in my judgment, the vessel should be released from arrest and the letter of undertaking given to the plaintiffs as alternative security should be returned.

In view of what has been said heretofore and while I am of the opinion that the vessel should be released from arrest, I do not think that the warrant of arrest should be set aside. There was nothing wrong in the issue of the warrant or its execution. In this regard, I would quote the following passage from *The Golden Trader*[4] where Brandon J said at p 380:

> So far as procedure is concerned, I think that, if the arrest is to be brought to an end, the right way to achieve that result is not to make an order setting aside the warrant of arrest, as asked for in the defendants' notice of motion, but to make an order for the release of the ship under 0 75 r 13(4). This is because the arrest was, as has been conceded by the defendants, lawfully made, and there can therefore be no justification for setting it aside, though there may be good reason, since the action is to be stayed, for ending it by release. This view as to the right form of order to be made is supported by *Foresta Romana SA* v *Georges Mabro (Owners)* (1940) 66 Ll L Rep 139, a case which I shall be discussing later.

Counsel for the defendants submitted that orders 2 and 3 of the deputy registrar are linked. He said that order 3 is consequential upon order 2. That would be so if I had upheld the ruling that the warrant of arrest should be set aside. However, having decided that the warrant should not be set aside, I should then have to determine whether, in view of the circumstances, including the stay of proceedings, the vessel should be released. This I have done. Counsel also submitted that the withdrawal of the appeal by the plaintiffs against the order for unconditional stay necessarily implies that the warrant of arrest should be set aside and the vessel released. For the reasons given above, I do not share the view that setting aside of a warrant of arrest must flow from an unconditional stay, though I agree that the vessel must be released unless the principle in the *Rena K* is applicable.

Are damages payable?

In the light of what I said above that there are no grounds to set aside the warrant of arrest, I do not think the question of damages for wrongful arrest arises at this time. Whether any damages are due eventually to the defendants on account of that arrest would have to await the outcome of the substantive claim that is being referred to arbitration. It is within the power of an arbitrator to award damages for wrongful arrest: see Lord Denning in *Astro Vencedor SA* v *Mabanaft*[7] at p 595. To succeed in a claim for damages for wrongful arrest, it is quite clear that the defendants must show that there were mala fides or malicious negligence on the part of the plaintiffs: see *The Evangelismos*[8] and *The Strathnaver*.[9]

There remains a subsidiary issue. Were the plaintiffs wrong in not agreeing to the release of the vessel on the morning of 14 March 1988 when the defendants agreed to the text of the letter of undertaking in the terms required by the plaintiffs? As I have stated above, the difficulty which prevented an agreement from being reached on alternative security was the wording of para 3 of the letter of undertaking. With the defendants agreeing to the wording, though under protest, I think the plaintiffs should have accepted the letter of undertaking. From that moment onwards the plaintiffs had no probable or reasonable cause to continue the arrest. While I accept that the plaintiffs were under no obligation to offer the defendants a proposal for alternative security, nevertheless they did. Counsel for the plaintiffs submitted that the offer to accept alternative security had been withdrawn on 12 March 1988. He said this followed from Godwin & Co's message that day, after the parties had failed to agree on para 3, that '(their) clients will therefore proceed to arrest the vessel and (Drew & Napier) can go ahead to file a bail bond for the release of the same.' In my view, all that that faxed message meant was that since the parties could not agree with the wording, the plaintiffs would proceed with the arrest. I do not think that that communication, viewed in the context, could fairly be construed to amount to a complete withdrawal of the offer to accept alternative security, if the defendants were subsequently to agree to the wording required by the plaintiffs.

The only question is whether the fact that the defendants agreed to furnish the letter of undertaking 'under protest' gave the plaintiffs a reasonable cause not to release the vessel. It seems to me that that expression meant, in the context, no more than that the defendants were reserving their rights, which they were entitled to do. In my opinion since alternative security had been furnished to the plaintiffs in terms which the plaintiffs had asked for, the plaintiffs had no further reasons not to release the vessel. The test to be applied to determine whether there was wrongful continuance of an arrest is the same as that applicable to wrongful arrest, ie mala fides or crassa negligentia implying malice: see *The Margaret Jane*.[10] In my judgment, the plaintiffs' refusal on 14 March 1988 to accept the letter of undertaking amounted to at least malicious negligence. The arrest was clearly continued unnecessarily. The plaintiffs are therefore liable for damages for the continued detention of the vessel from 14 to 15 March 1988. However, I would not order

that the quantum of damages be assessed by the registrar. I think it would be expedient that the assessment of the quantum of damages be left to the arbitrator to whom the claim is being referred.

In the result the appeal is allowed as regards the second order to set aside the warrant of arrest. That order of the deputy registrar is set aside. Order 3 will remain. So will orders 1 and 4 (in respect of which the plaintiffs withdrew their appeal). Order 5 should, however, be modified to read:

> That the plaintiffs do pay to the defendants damages for wrongful detention of the vessel 'Evmar' from 14 to 15 March 1988 and such damages shall be assessed by the arbitrator to whom the plaintiffs and the defendants will be referring their dispute.

Costs

The defendants submitted that the main thrust of their application in the summons-in-chambers was to secure the immediate release of the vessel without having to furnish alternative security and to obtain a stay of all further proceedings. As they have succeeded in both, they should be awarded costs, or at least a substantial part of those costs. As I see it, there were two main applications in the summons. The first was to have the warrant of arrest set aside (primarily for non-disclosure of material facts) and the second was for a stay of proceedings. The defendants have failed in the first but succeeded in the second. Of course the defendants have also succeeded in obtaining the release of the vessel without having to furnish any alternative security. The arguments before the deputy registrar centred more on the first point than on the second. Before me there was hardly any argument on the point regarding stay as the appeal against that order had been withdrawn. The defendants have failed to obtain the release of the vessel on the main ground, ie setting aside of the warrant.

Having considered all the circumstances, including the arguments raised by the parties at the further hearing, I think it is just that the plaintiffs should only bear one-third the costs of the defendants for the hearings before me as well as before the deputy registrar.

Order accordingly.

Solicitors: *Godwin & Co; Drew & Napier.*

Reported by *Terence Tan Bian Chye*

Seah Kok Huah v Public Prosecutor

HIGH COURT (SINGAPORE) – MAGISTRATE'S APPEAL NO 149 OF 1987
LAI KEW CHAI J
30 MARCH 1989

Criminal Law – Cheating foreign workers pursuant to a common intention – Whether elements of case proved

Evidence – Evidence of possession of forgery equipment – Whether evidence relevant and whether evidence of possession highly prejudicial to accused

Criminal Procedure – Sentencing – Four months' inprisonment for offence of cheating foreign workers pursuant to a common intention – Accused's first offence – Amount of money paid to accused significant to complainants

The appellant, a contractor and supplier of foreign workers, was convicted of three charges of having cheated three Bangladeshis by providing them with forged work permits instead of genuine ones. The prescribed punishment for each conviction was imprisonment for a term which could extend to seven years and a fine. The appellant was sentenced to four months' jail on each charge. The sentences for the first and second convictions were to run consecutively and the third sentence was to run concurrently with the two (sic). He appealed against the convictions and sentence. He contended that the district judge who decided the case had misdirected himself on the nature and ingredients of the charges which were not charges of cheating alone but were charges of cheating committed pursuant to a common intention. It was also argued that there was no evidence linking the appellant to the cheating. The appellant claimed that evidence that equipment for forging work permits was found in his possession was wrongly admitted and highly prejudicial to him since he was not charged with forgery. Appeal against the sentence was on the grounds that the amounts involved were small, that this was the appellant's first offence, his role in the crime was minor and that he had co-operated with the police.

Held, dismissing the appeals against conviction and sentence:

(1) Reading the whole of the district judge's grounds of decision, it was clear that the district judge was aware of the nature of the charges. He had made a finding of fact that the appellant and his confederate had planned to cheat the three complainants.

(2) There was overwhelming evidence establishing beyond reasonable doubt that the appellant had planned to cheat the complainants. The evidence of the appellant that he was not involved in the cheating was, not surprisingly, disbelieved by the district judge.

(3) The appellant's argument that the evidence that he was found in possession of equipment for forgery was wrongly admitted was totally untenable in the light of his modus operandi for cheating.

(4) The amount involved in the cheating was not insignificant to the complainants. There was a need to deter other like-minded people who might be tempted to prey on foreign workers.

(5) The sentence of the appellant was not manifestly excessive and would have been enhanced by the court except for two factors. The first was that the appellant's wife suffered a